

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY CHAMBER SUMMONS NO. 155 OF 2006
E.A. NO.96 OF 2000
IN ARBITRATION CASE NO.19 OF 2000

Dinesh Shah .. Plaintiff
vs
Ravi Sharma .. Defendant
&
Dena Bank .. Intervener

Mr.H.K.Gada with Ms.Yogini Gada i.b Harakhchand
& Co Shukla & Shukla for & Plff
Mr.D.Shukla i/b Shukla with Ms.Anjali Co for Interv.
Mr.S.A.Bhagwat with for i.b.Law
Locus defendant

CORAM : SMT R.S.DALVI, J
DATE : 2nd February, 2007
JUDGMENT (PER SMT. R.S. DALVI,J.)

1. This Chamber Summons is taken out by the applicant/Intervener Bank for raising the attachment levied by the plaintiff over the mortgaged property which is gala No.301-C,in Viren Light Industrial Premises Cooperative Society Ltd on plot No.408 Mogul Lane, Mahim, Mumbai-400 016. The Intervener claims to be the secured creditor of the defendant under a mortgage decree by deposit of title deeds with them. The Intervener has produced the title deeds deposited with the Intervener enumerated in a Memorandum of Understanding. These are contained in:

(a) an agreement on an adhesive stamp paper of Rs.5/- for the aforesaid property showing receipt by the vendor who was the earlier owner of the said gala for Rs.30,500/- received from the defendant by cheque No. 384607 of United Commercial Bank Matunga, Mumbai. The agreement further shows the declaration of the vendor that he has not created any lien or entered into any agreement on the same unit and that the defendant in the suit shall abide by the rules and regulations of the society. The agreement further shows that a letter requesting the secretary of the society to transfer the share certificates to the name of the defendant is attached with the said agreement. The agreement is signed by the vendor and the defendant.

(b) The share certificate of the society bearing No. 44 under membership Regulation No.10 for 5 shares of the society is shown to be transferred to the name of the defendant.

(c) A letter of the society dated 24th June,

1995 addressed to the Senior Manager of the Intervener Bank notes lien of the bank in respect of the said unit. It specifies that the unit would not be transferred without the written consent of the bank.

(d) The certificate dated 9th October, 1996 is issued by the joint Secretary of the society certifying that the defendant is the owner of the said unit from 1978 and in lawful possession as such owner untill date of the certificate.

2. It can be seen that the agreement is on a stamp paper as required at the time of its execution. The transfer of the share certificate in the name of the defendant is made on 19th August, 1979. The defendant as the owner has created a mortgage in favour of the Intervener Bank by deposit of such title deeds.

3. The plaintiff obtained an Arbitration Award of 28th May, 2001 which the plaintiff sought to execute by warrant of attachment attaching the movable and immovable properties of the defendant on 26th March, 2002. The plaintiff and his sister concern in which the plaintiff's wife is the

proprietary got issued in all 6 warrants of attachment for movable properties and 6 warrants of attachment for immovable properties of the defendant. Thereafter, the warrants of sale came to be issued on 23rd January, 2003 and public notices thereupon came to be issued on 15th February 2003 and 17th February 2003 in two newspapers.

4. The applicant/Intervener seeks to raise the attachment only on immovable property which is unit no.301C at the aforesaid address. The Intervener claims to be a secured creditor and claims priority in repayment of the debt by the defendant.

5. The Intervener has obtained a decree passed by D.R.T. II in Misc.Application No.53 of 2002 and obtained Recovery Certificate No.243 of 2002 in Appeal No.117 of 2004. The plaintiff claims to have challenged the decree in appeal. The plaintiff has failed to obtain any order for stay of the execution of the Recovery Certificate. Consequently, even the DRAT has considered and not negated the Intervener's claim of priority as a secured creditor.

6. It will first have to be seen as to who is a

secured creditor and what are his specific priorities in law. The Law Lexicon by P.Ramanathan Aiyar (2nd) Edition 1997 at page 1738 describes a secured creditor as "a creditor holding security, the realisation of which would satisfy his claim." Hence, a secured creditor is one who has security for his debt. If further shows a secured creditor to be a person holding a mortgage, charge or lien on the property of the debtor as security of the debt due to him from the debtor.

7. The Intervener contends that he holds a mortgage by deposit of title deeds to secure his claim against the defendant.

8. The plaintiff has challenged the mortgage created by the defendant in favour of the applicant/Intervener.

9. It is therefore, to be seen whether the mortgage by deposit of title deeds is legal. It is the plaintiff's case that it is not because the mortgage is not registered and not an attested document. It will therefore have to be seen whether the mortgage by deposit of title deeds requires registration to be valid document in law.

10. It has been held by the Privy Council in the case of *Sundarachariar vs Narayana Ayyar AIR 1931 PC 36* that when mortgage was by an act of deposit and payment of money showing only a written record of the particulars of the deeds by which they were deposited, it did not require registration. In that case, a memorandum was only a written record of the particulars of the deeds which was the subject of an agreement constituted merely by an act of deposit and payment of money. It was merely a list of documents deposited with the mortgagee and nothing more. It did not embody the terms of the agreement between the parties and therefore, did not require registration. Even in this case, there was no written agreement between the parties, the defendant and Intervener/applicant. All that has been done between the defendant and the Intervener is that the defendant has deposited the aforesaid documents as his documents of title or title deeds with the General Manager of the Intervener bank. A memorandum showing merely the deposit made by the defendant with the Intervener is recorded. To the memorandum are attached the aforesaid documents. The memorandum is, therefore, only a written record of the particulars of the documents merely by an act of deposit of title deeds by the defendant and payment of money by the

applicant/Intervener bank. The memorandum, therefore, neither purported nor operated to create the any right, title or interest in the property included in the documents. It was merely by the deposit of title deeds. Hence, the mortgage merely by deposit of title deeds cannot and will not require registration.

11. Further, in the case of *Sir Hari Shankar Paul vs Kedar Nath Saha AIR 1939 PC 167* it has been held that though a mortgage is to be effected by a registered instrument duly signed and attested, the mortgage by deposit of title deeds is expressly recognised and saved because of the convenience of this form of security and hence when merely the title deeds are deposited, no registration is required even if it is accompanied by a collateral written agreement, unless the parties contemporaneously entered into a contractual writing which evidences the deposit and contains the essentials of the transaction expressed conferring a power of sale on the mortgagee and created an interest in the property in favour of the mortgagee. In this case, the memorandum shows that the title deeds are deposited and refers them in the schedule. It does not require registration as it is only a mortgage by deposit of title deeds

and accordingly makes the applicant/Intervener a
secured creditor of the defendant for the property
of which title deeds are deposited being aforesaid
unit No.301 C.

12. Accordingly, the attachment on unit No.301 C
at the aforesaid address is raised.

13. This order is stayed for two weeks.

(Smt.R.S.Dalvi,J)